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PETITION NOT PRINTED

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JAMES R. BROWNING

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 128

VERNON KIMBROUGH,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

	Page
BRIEF FOR THE PETITIONER:	
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Argument	5
INTRODUCTION:	
I. The Rule of Lenity Should Be Applied and Sections 3 and 4 of the National Motor Vehicle Theft Act Construed as Not Authorizing Separate Punishment of the Person With Respect to One Automobile in Order to Avoid the Risk of Irrational and Unjust Multiplication of Penalties in Interstate Automobile Theft Cases	7
II. The Legislative History of the National Motor Vehicle Theft Act Gives No Clear Indication That Congress Intended to Authorize Separate Punishments of the Same Person for Transporting and for Receiving and Concealing a Single Motor Vehicle	11
III. Application of the Rule of Lenity in the Interpretation of the National Motor Vehicle Theft Act Would Be in Accord With the Trend of Recent Decisions in This Court	14
Summary of Argument	19
Conclusion	20

CITATIONS

Page

CASES:

Bell v. *United States*, 349 U.S. 81, 83 ..... 5, 7, 14
Blockburger v. *United States*, 284 U.S. 299 17
Gore v. *United States*, 357 U.S. 386 ..... 17, 18
Harris v. *United States*, 359 U.S. 19 ..... 17, 18
Heflin v. *United States*, 358 U.S. 415 ..... 5, 8, 15, 16, 17, 18, 19
Ladner v. *United States*, 358 U.S. 169 ..... 5, 14
Prince v. *United States*, 352 U.S. 322 ..... 5, 15
United States v. *Turley*, 352 U.S. 407 11
Williams v. *United States*, 171 F.2d 952 (C.A. 5) 10
Woody v. *United States*, 258 F.2d 535 (C.A. 6) 18

STATUTES:

41 Stat. 324, 325 (National Motor Vehicle Theft Act) 2
18 U.S.C. 88 (present 18 U.S.C. 371) 3
18 U.S.C. 254 14
18 U.S.C. 408 (present 18 U.S.C. 2312 and 2313) 3
18 U.S.C. 2113 15
18 U.S.C. 2312 3
18 U.S.C. 2313 3
18 U.S.C. 2421 14
Federal Rules of Criminal Procedure, Rule 35 17

MISCELLANEOUS:

58 Cong. Rec. 5472 12
58 Cong. Rec. 6434 13
House Committee on the Judiciary, Report No. 312, accompanying H.R. 9203, 66th Cong., 1st Sess., p. 1 11
136 A.L.R. 948 8
28 A.L.R. 2d 1182 8
Clark & Marshall, *Law of Crime* (6th ed.) 8
Federal Rules of Criminal Procedure, Rule 35 .. 17
Perkins, *Criminal Law* 8

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Opinion Below

The order of the Court of Appeals (R. 17) is reported at 272 F.2d 944.

Jurisdiction

The judgment of the Court of Appeals was entered December 28, 1959 (R. 17). The petition for a writ of certiorari was filed January 22, 1960, and was granted on June 6, 1960 (R. 18). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

Question Presented

Whether petitioner could validly be given cumulative sentences under the National Motor Vehicle Theft Act for "transporting" a stolen automobile in interstate commerce and for receiving, concealing, and storing the same automobile.

Statute Involved

The National Motor Vehicle Theft Act (41 Stat. 324, 325) provided at the time of the prosecution involved in the case at bar as follows:

"SEC. 2. That when used in this Act:

(a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;

(b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

"SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been

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stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The statute also then appeared consolidated into a single section as 18 U.S.C. 408. The relevant portions of the Act (sections 3 and 4) now appear as 18 U.S.C. 2312 and 2313.

Petitioner was also charged and sentenced under the conspiracy statute (then appearing as 18 U.S.C. 88) but no issue is raised concerning this charge.

Statement

In the United States District Court for the Eastern District of Kentucky, on April 28, 1941, petitioner, who was represented by counsel, pleaded guilty to an indictment in three counts (R. 5). Count one charged a conspiracy to transport in interstate commerce and to receive, conceal and store a stolen motor vehicle (R. 2, 3). Count two charged that on February 12, 1941, petitioner and his co-defendants transported from Atlanta, Georgia, to Owen County, Kentucky, "one 1941 Super DeLuxe Ford two-door sedan automobile, Motor No. 18-5929623"; that this automobile had been theretofore stolen from Roundtree Motor Co., in Lake City, Florida; that petitioner and his co-defendants knew that the automobile had been stolen (R. 3). Count three charged that "on and about the 19th day of January, 1941, and between said date and the 13th day of February, 1941," petitioner and his co-defendants did "receive, conceal, and store one 1941 grey Super DeLuxe

Ford two-door automobile, Motor No. 18-5929623" which had been stolen from the Roundtree Motor Co. in Lake City, Florida, on January 19, 1941, and which was moving as and was a part of interstate commerce, well knowing that said automobile had been so stolen (R. 3, 4). Petitioner was given consecutive sentences of two years on the conspiracy count and five years on each of the substantive counts, for a total of 12 years' imprisonment (R. 5, 6).

The present proceedings arose on April 9, 1959,[1] when petitioner filed in the District Court a motion to vacate the sentence imposed under the third count of the indictment on the ground that it charged the same offense as that for which he had been sentenced on the second count (R. 7, 8). On June 2, 1959, after receiving written briefs, the District Court denied the motion to vacate without opinion (R. 13).

Petitioner filed a notice of appeal on July 13, 1959 (R. 16). On December 28, 1959, the Court of Appeals entered its judgment affirming the order of the District Court (R. 17).

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[1] The reasons for petitioner's continued imprisonment under this 1941 sentence do not appear in the record. As noted in the government's Brief in Opposition (p. 2, n. 1), petitioner was sentenced concurrently with his sentence under the Dyer Act charges to an additional five years for attempted escape. He was conditionally released in October, 1951. In 1955 he pleaded guilty to a charge of transporting stolen cars and was sentenced to imprisonment for five years. He has served the time imposed on the 1955 charge and is now in Alcatraz serving the time due for violation of his conditional release.

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ARGUMENT

Introduction

Petitioner is seeking to vacate the sentence which he is now serving on the ground that it appears from the face of the indictment and the judgment that the sentence is illegal. He makes no contention which requires an examination of anything other than the face of the indictment and the judgment. It seems clear that under these circumstances collateral attack is proper and, since petitioner is now in custody under the portion of the sentence which is attacked, there is no doubt as to the propriety of a motion under 28 U.S.C. 2255. See, *e.g., Heflin* v. *United States,* 358 U.S. 415; *Ladner* v. *United States,* 358 U.S. 169; *Prince* v. *United States,* 352 U.S. 322; *Bell* v. *United States,* 349 U.S. 81 (a case in which there was a plea of guilty).

In its Brief in Opposition (pp. 3, 4) the government argues, in effect, that the question of whether or not cumulative sentences were properly imposed in this case depends upon whether or not petitioner committed acts of receiving, concealing and storing which were "separate and distinct" from the act of transporting the automobile in interstate commerce. The government then concludes that petitioner has not presented an adequate factual foundation for his attack upon the sentences because by pleading guilty to all of the counts in the indictment he must be taken to have admitted the commission of such separate and distinct acts.

Petitioner's contention, however, is that whether or not separate and distinct acts may be involved, the National Motor Vehicle Theft Act should be construed as not au-

thorizing the imposition of separate punishments upon a single individual with reference to a general course of conduct involving a single automobile. In this view the facts affirmatively appearing on the face of the indictment are sufficient to determine the legal issue presented.

An analysis of the indictment shows that petitioner was charged with transporting in count two and receiving, concealing and storing in count three the same automobile. It also shows that he was charged under each count with reference to the same general course of conduct, alleged to be as follows:

> (1) Petitioner and his co-defendants either (a) stole the automobile in Lake City, Florida, on January 19, 1941, or (b) acquired it on some unspecified date between January 19 and February 12 at some unspecified place from some unspecified person knowing that it had been stolen.
>
> (2) Petitioner and his co-defendants, from the date on which they acquired possession of the automobile until February 13, 1941, did "receive, conceal, and store" the automobile which was "then and there moving as, was a part of, and constituted interstate commerce."
>
> (3) Petitioner and his co-defendants on February 12, 1941, transported the automobile from Atlanta, Georgia, to Owen County, Kentucky.

That the government was charging petitioner with acts which were part of one general transaction or course of conduct with reference to the stolen automobile is made clear by the fact that the transportation count charged a single act of interstate movement occurring on February 12, 1941, while the receiving count charged a course

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of conduct which both preceded and followed that act of transportation.

Petitioner contends that sections 3 and 4 of the National Motor Vehicle Theft Act should not be construed to authorize consecutive sentences under these facts, without regard to what he may have done with or to the automobile during the time it was in his possession. In the argument which follows it will be contended that this position is sound in principle, consistent with the legislative history of the statute, and supported by the trend of recent decisions of this Court in analogous situations.

I.

The Rule of Lenity Should Be Applied and Sections 3 and 4 of the National Motor Vehicle Theft Act Construed as Not Authorizing Separate Punishment of One Person With Respect to One Automobile in Order to Avoid the Risk of Irrational and Unjust Multiplication of Penalties in Interstate Automobile Theft Cases.

In *Bell* v. *United States*, 349 U.S. 81, 83, this Court said: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." The Court also said that ". . . doubts will be resolved against turning a single transaction into multiple offenses . . ." (349 U.S. at 84). In this portion of his brief petitioner will give his reasons for urging that the rule of lenity should be applied. In succeeding portions he will present his reasons for concluding that the legislative history of

the statute permits application of the rule of lenity and for concluding that such application would be in accord with recent decisions of this Court.

In closely analogous situations to that involved in this case the general criminal law enforced in the states, both common law and statutory, does not permit multiplication of punishment. A person guilty of larceny is regarded as guilty of only one crime and is subjected to only one punishment no matter what he does with the stolen goods. The fact that he may conceal them, or use them, or store them, or sell them, does not constitute the commission of additional crimes for which additional punishments may be meted out. (See generally Perkins, *Criminal Law*, Ch. 4.) This result is proper because in the generality of instances concealment is inherent in the act of larceny and the whole purpose of the larceny is to use or sell or otherwise dispose of the goods stolen. The problems in state law have been those of determining whether multiple offenses result when property is stolen from several owners at the same time (see cases collected in 28 A.L.R. 2d 1182) or when there is a series of takings from the same owner over a period of time (see cases collected in 136 A.L.R. 948). Neither of these problems is, of course, involved in the case at bar. In a more closely analogous situation, however, the common law and the normal state law rule is that a person may not be convicted of and punished for both the crimes of larceny and of receiving with respect to the same stolen goods. See Perkins, *Criminal Law*, p. 275; Clark and Marshall, *Law of Crimes* (6th ed.), p. 858. A similar rule was applied by this Court in *Heflin* v. *United States*, 358 U.S. 415, in holding that multiple punishment could not be imposed for robbing a bank and for receiving the property obtained in the robbery.

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The situation under the National Motor Vehicle Theft Act is basically similar to that involved in an ordinary larceny prosecution. True, Congress did not attempt (because of constitutional limitations) to make criminal the original act of theft. Instead, it defined the basic crime as transporting in interstate or foreign commerce a motor vehicle knowing the same to be stolen. As in larceny cases, it seems inherent in the proscribed act that the transporter will be attempting to conceal the automobile and that he will be transporting it for the purpose either of using it or of bartering, selling or disposing of it. Hence it would seem desirable in principle that the thief who takes a motor vehicle across a state line should not be subjected to a multiplication of severe penalties for acts which are a normal concomitant of both the larceny and the transporting and for which he would not be subjected to multiple penalties under state law if he did not take the vehicle into interstate commerce.

Furthermore, acceptance of the government's argument that the commission of separate acts can result in the commission of separate offenses under the statute even though a single automobile is involved would result in giving to the prosecutor and the trial court almost unlimited discretion in carving separate crimes out of what is essentially a unitary criminal transaction. Assume, for example, that the underlying facts in the case at bar were as follows: (1) Petitioner "received" the automobile in Florida from the thief knowing it to be stolen; (2) he drove it into Georgia and hid it overnight in a barn; (3) he drove it into Tennessee where he changed license plates; (4) he drove it into Alabama and used it in the commission of a burglary; (5) he drove it into Georgia where he repainted it; and (6) he drove it into Kentucky where he was arrested. Would the United States Attorney have discretion to charge and, on a finding of guilty on each,

would the judge have discretion to impose consecutive five-year sentences for each of the following crimes: (1) receiving the automobile in Florida while it was moving in interstate commerce; (2) transporting from Florida to Georgia; (3) concealing in Georgia; (4) transporting to Tennessee; (5) concealing in Tennessee; (6) transporting to Alabama; (7) concealing in Alabama; (8) transporting to Georgia; (9) concealing in Georgia; (10) transporting to Kentucky; and (11) concealing in Kentucky? That such a multiplication of offenses is not wholly fanciful is suggested by *Williams* v. *United States*, 171 F.2d 952 (C.A. 5), certiorari denied, 337 U.S. 920, where the defendant was charged in the first count with transporting a stolen automobile from Louisiana to Oklahoma via Arkansas on November 8 and in the second count with transporting the same automobile from Louisiana to Arkansas on November 11. Consecutive sentences were imposed on the two counts and affirmed on appeal.

But even if the government's contention is limited to permitting only two charges with respect to each car stolen —one for transporting and one for receiving, concealing and storing—it seems undesirable to accept that contention in the absence of the clearest statutory direction. Why should the man who steals or receives a car in one state and transports it to another be subjected, in the discretion of the prosecutor and the court, to the imposition of two consecutive five-year sentences while the professional receiver to whom he sells the automobile will, if he disposes of the vehicle within the state where he receives it, be subjected only to a maximum sentence of five years on a single count? Shouldn't the statute instead be interpreted to impose a single penalty, and only a single penalty, upon each person who is involved with any one stolen motor vehicle which is transported in interstate commerce?

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II.

The Legislative History of the National Motor Vehicle Theft Act Gives No Clear Indication That Congress Intended to Authorize Separate Punishments of the Same Person for Transporting and for Receiving and Concealing a Single Motor Vehicle.

The legislative history (much of which was referred to by this Court in *United States* v. *Turley*, 352 U.S. 407) is quickly set out. A report of the House Committee on the Judiciary, H. Rep. No. 312, accompanying H.R. 9203, 66th Cong., 1st Sess., pp. 1, 4, discussed the purpose of the bill in its opening and closing paragraphs which read as follows:

> "The Congress of the United States can scarcely enact any law at this session that is more needed than the bill herein recommended, and that has for its purpose the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. There has been and is now a most widespread demand for such a law. State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines. The losses to the people of the United States by reason of this stealing amounts to hundreds of thousands of dollars every year. It is getting worse. It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 percent. It is automobiles of that price that are generally stolen. Automobile

thieves who make a specialty of this crime do not steal many of the higher priced cars, the reason being of course that they are not so easily sold. . .

• • • • •

"The purpose of the proposed law is to suppress crime in interstate commerce. Automobiles admittedly are tangible property capable of being transported in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States in the Union. No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it, with the penalties attached."

The foregoing report gives little help in determining Congressional intent on the issue in the case at bar. It is of some significance, however, that the House Committee appeared to be thinking of reaching different persons, rather than multiplying punishments on single persons, when it included the sentence: "Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines." This emphasis was repeated in the House debate by Congressman Dyer, sponsor of the legislation (58 Cong. Rec. 5472):

"[The bill] provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it."

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The debate in the Senate was no more enlightening. Senator Cummins discussed the two separate sections of the Act as follows (58 Cong. Rec. 6434):

> "... The practice is to steal an automobile close to a State line and run it across the State line. The first section [§3] is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached."

This statement is subject to conflicting interpretations but, especially in view of the last sentence, it would appear reasonable to understand the Senator as saying only that section 3 is intended to punish the transporter and, because it is customary for a transporter often to dispose of the vehicle to another party after crossing the state line, section 4 is included to impose a punishment on the latter party if, knowing the vehicle to be stolen, he receives, conceals, sells or otherwise disposes of it.

In short, it would be a reasonable interpretation of the statute, in the light of its legislative history, to find that it was intended to authorize punishment of each person involved in an interstate automobile theft, whether his role was transporting, receiving, concealing, storing, bartering, selling or disposing, but that it was not intended to authorize multiple punishment of any person who performed more than one of these roles with respect to a single vehicle. Hence this is an appropriate case for the application of the rule of lenity.

III.

Application of the Rule of Lenity in the Interpretation of the National Motor Vehicle Theft Act Would Be in Accord With the Trend of Recent Decisions in This Court.

Recent cases in this Court have indicated a trend toward application of the rule of lenity to avoid multiple punishment for a single criminal act or course of criminal conduct in the absence of clear Congressional intent to the contrary. These cases have dealt both with problems arising when Congress has made an act a crime and several such acts are committed contemporaneously and with problems (more closely related to the case at bar) where Congress has made criminal separate portions of a criminal act or course of conduct and one person commits acts which fall within more than one of the penal provisions.

Illustrative of the first type of case are *Bell* v. *United States*, 349 U.S. 81 and *Ladner* v. *United States*, 358 U.S. 169. In *Bell* the question was whether a man who transported two women on the same trip in the same vehicle could be subjected to cumulative punishment under two counts charging two violations of the Mann Act, 18 U.S.C. 2421. In the absence of any clear statutory intent to the contrary, the Court applied the rule of lenity to forbid multiple punishment. In *Ladner* the defendant received cumulative sentences for assaulting two federal officers with a deadly weapon in violation of former 18 U.S.C. 254. The Court held that if only a single shot were fired by the defendant, the rule of lenity should be applied to forbid cumulative punishment. There is in these cases, of course, an emphasis upon the singleness of the act and of the intent of the defendant and a similar emphasis would be appropriate in a Dyer Act case if the question were whether a defendant could receive cumulative punishment

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for transporting or receiving or concealing or selling two cars at the same time.

Other cases demonstrate, however, that application of the rule of lenity does not depend on showing a single act where Congress has made criminal separate portions of a course of criminal conduct which may extend over a period of time and occur in more than one place. Illustrative here are *Prince* v. *United States*, 352 U.S. 322, and *Heflin* v. *United States*, 358 U.S. 415, both involving the Federal Bank Robbery Act (18 U.S.C. 2113). In *Prince*, the defendant, as the result of a single hold-up of a bank, was charged with entering the bank with intent to commit a robbery and with the bank robbery itself. He was given a sentence of 15 years for entering and 20 years for robbing to be served consecutively. Examining the legislative history this Court concluded that when Congress created the crime of entering it did not intend to permit a doubling of the punishment in every bank robbery situation. The Congressional motive was seen to be that of providing for punishment of a person who enters a bank with the intent of committing a robbery but is frustrated before completing the basic crime of robbery.

More closely related to the problem in the case at bar is *Heflin* where the Congressional purpose in dividing a criminal course of conduct into separate crimes was found to be to insure that each individual involved in any of the separate portions of that course of conduct should be criminally punished rather than to authorize a multiplication of penalties upon any single offender. The defendant was charged with and convicted of committing a bank robbery with force and violence in violation of subsection (d) of 18 U.S.C. 2113 and with receiving, possessing, concealing, storing, and disposing of the stolen money in violation of subsection (c) of the same section. Consecutive sentences were im-

posed. After examining the legislative history this Court concluded that the separate penalty imposed for receiving, concealing, etc., ". . . was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." (358 U.S. 419, 420.)

Although they arise under different statutes with separate legislative histories, the problems involved in *Heflin* and those in the case at bar are so strikingly similar that, it is submitted, identical results should be reached. In each case Congress has defined a basic criminal act—bank robbery in the one case, transporting of a stolen automobile in interstate commerce in the other. In each case Congress has sought to impose punishment upon those persons who knowingly receive, conceal, store, barter, sell, or dispose of the fruits of the basic crime—the loot from the robbery in one case, the stolen car which has been transported in the other. In each case the person who commits the basic crime in the very process of so doing commits acts which constitute a violation of the proscription against receiving, concealing, etc., if it is held applicable. In each case Congress has not clearly indicated an intent to impose double punishment upon the person who commits the basic crime. Here then, as in *Heflin,* the conclusion should be that a single person cannot be separately punished both for transporting and for receiving with respect to the same automobile.

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Heflin also constitutes an answer to the contention made made by the government in its Brief in Opposition that the rule of lenity is limited to those cases where a single act is involved. In *Heflin* a majority of the Court held that the case must be taken as a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct an "illegal sentence"—a motion which limits consideration to the face of the indictment. Hence, the case was in the same posture as the one at bar and the sentence was adjudged illegal on its face. Yet in *Heflin*, as here, it would have been possible to conjure up the possibility that the robbers had committed separate acts with respect to the loot. In fact, the Court mentions the possibility that the robbers may have gotten together after the robbery and divided up the loot—clearly a separate act committed at a separate time and place and not inherent in the act of robbing. Still the Court held that with respect to a single robbery punishment could not be separately imposed on one person both for the robbery and for receiving—apparently without regard to the possibility that the acts which constituted a violation of the receiving section might have been separated in time and place from the robbery and, in fact, might have been the result of separate criminal impulses.

Petitioner realizes that there are other recent cases in this Court which, in the sense that they permit double punishment to arise from a single act or transaction, point in a different direction. It is submitted, however, that these cases are sufficiently distinct both with reference to legislative history and factual background as to preclude the necessity for discussing them here. Perhaps, however, a word should be said about the narcotics cases. *Blockburger* v. *United States*, 284 U.S. 299; *Gore* v. *United States*, 357 U.S. 386; and *Harris* v. *United States*, 359 U.S. 19. In finding a Congressional intent to multiply punishments in those cases the Court was dealing both with a significantly dif-

ferent factual situation and with a quite distinct legislative history than is involved in the interpretation of the National Motor Vehicle Theft Act.

In defining the separate offenses involved in the narcotics cases Congress was not seeking to reach different persons involved in an illegal transaction. Instead, Congress was making criminal separate acts in a context where one person might commit all, or less than all, of those acts. Thus, in the course of handling narcotics a defendant might violate only the provision against dealing with narcotics other than in the original stamped package, or only the provision against selling without a written order, or only the provision against receiving, concealing, etc., any narcotic drug knowing it to have been illegally imported; or the defendant might violate all three of these provisions. Thus in *Gore* he was charged with violating all three; in *Harris* only with two. Each of these provisions came into the statute at separate times, and a Congressional intent to deal with increasing severity with narcotics offenders was discernible. Thus, the problem before the Court in the narcotic cases, in contrast to the problem before it in *Heflin,* was so strikingly different from that in the case at bar as to make them clearly distinguishable.

Petitioner is aware that the cases in the courts of appeals have uniformly permitted separate punishments under sections 3 and 4 of the National Motor Vehicle Theft Act. These cases, however, should not be persuasive here since in each of them the point was disposed of without the detailed examination of legislative history and of policy which is necessary to a solution of the problem under the standards set by this Court in the cases discussed above. See *Woody* v. *United States,* 258 F.2d 535 (C.A. 6), affirmed by an equally divided Court, 359 U.S. 118, and the earlier cases cited therein.

Summary of Argument

Petitioner contends that in the spirit of the rule of lenity and in the light of general criminal law traditions sections 3 and 4 of the National Motor Vehicle Theft Act should not be construed as authorizing the imposition of consecutive sentences upon one person for transporting and for receiving, concealing and storing a single automobile as a part of one general course of conduct.

Petitioner contends that the legislative history shows no affirmative intent of Congress to authorize such cumulative punishment. In fact, it would be quite consistent both with the face of the statute and with all of the available legislative history to conclude that the Congressional purpose was merely to impose a single punishment upon each person involved in any portion of an interstate automobile theft transaction and not to permit a multiplication of penalties upon any single individual who committed more than one of the proscribed acts.

Petitioner contends that acceptance of the interpretation of the statute urged by him would be in accord with the trend of recent decisions in this Court, and particularly in accord with the conclusion reached in a closely analogous situation in *Heflin* v. *United States,* 358 U.S. 415.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgments below be reversed and the cause remanded for the purpose of vacating and correcting the sentence in accordance with petitioner's motion.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Summary of argument	5
Argument	9
I. This case does not involve a single act or transaction	10
II. Separate acts of transportation and of concealment are subject to separate punishment	14
A. The language of the statute	14
B. The legislative history	18
C. The judicial decisions	22
Conclusion	30

CITATIONS

Cases:

Aaronson v. *United States*, 175 F. 2d 41	17
Albrecht v. *United States*, 273 U.S. 1	17
Austin v. *United States*, 224 F. 2d 273	24
Batson v. *Squier*, 146 F. 2d 264, certiorari denied, 324 U.S. 874	23
Bell v. *United States*, 349 U.S. 81	8, 26
Burton v. *United States*, 202 U.S. 344	17
Carpenter v. *Hudspeth*, 112 F. 2d 126	17
Carroll v. *Sanford*, 167 F. 2d 878	17
Carroll v. *United States*, 174 F. 2d 412, certiorari denied, 338 U.S. 874	17
Chrysler v. *Zerbst*, 81 F. 2d 975	23, 24
Crawford v. *United States*, 214 F. 2d 313	24
Cuddy, In re, 131 U.S. 280	11
Doll v. *Johnston*, 95 F. 2d 838, certiorari denied, 304 U.S. 574	23, 24
Donaldson v. *United States*, 82 F. 2d 680	14

577048—60——1

Cases—Continued Page

Gore v. *United States*, 357 U.S. 386 ..... 27, 28
Goto v. *Lane*, 265 U.S. 393 12
Heflin v. *United States*, 358 U.S. 415 ..... 8, 9, 17, 28, 29
Hull, Ex parte, 312 U.S. 546 11
Inman v. *United States*, 243 F. 2d 256, certiorari denied, 358 U.S. 888 17
Jackson v. *Hudspeth*, 111 F. 2d 128 ..... 23, 24
Knewel v. *Egan*, 268 U.S. 442 12
Ladner v. *United States*, 358 U.S. 169 27
Lindsay v. *United States*, 134 F. 2d 960, certiorari denied, 319 U.S. 763 ..... 23, 24, 25
Madsen v. *United States*, 165 F. 2d 507 24
Milanovich v. *United States*, 275 F. 2d 716, pending on writ of certiorari, No. 79, this Term 17
Phillips v. *United States*, 206 F. 2d 923 15
Pifer v. *United States*, 158 F. 2d 867, certiorari denied, 329 U.S. 815 24
Prince v. *United States*, 352 U.S. 322 ..... 8, 28, 29
Record v. *Hudspeth*, 126 F. 2d 215, certiorari denied, 316 U.S. 703 23
Thomas v. *United States*, 249 F. 2d 429, certiorari denied, 355 U.S. 936 17
United States v. *Di Carlo*, 64 F. 2d 15 14
United States v. *Dunbar*, 149 F. 2d 151, certiorari denied, 325 U.S. 889 17
United States v. *Guido*, 200 F. 2d 105 14
United States v. *Hampden*, 294 Fed. 345 ..... 24, 25
United States v. *Runion*, 47 F. Supp. 594 24
United States v. *Spradley*, 65 F. Supp. 136, affirmed, 162 F. 2d 203 24
Woody v. *United States*, 359 U.S. 118 ..... 8, 22, 23
York v. *United States*, 299 Fed. 778 23

Statutes:

Federal Bank Robbery Act, 48 Stat. 783, as amended 28
National Motor Vehicle Theft Act, 41 Stat. 324, 18 U.S.C. (1940 ed.) 408:
Sec. 3 ..... 2, 3, 7, 8, 14, 18, 21, 22, 27
Sec. 4 ..... 2, 3, 7, 8, 14, 18, 21, 22, 27
59 Stat. 536 21
18 U.S.C. 111 (formerly 18 U.S.C. 254) 27
18 U.S.C. 2312 ..... 2, 7, 14, 15, 16
18 U.S.C. 2313 ..... 2, 3, 7, 14, 15, 16
28 U.S.C. 2255 ..... 4, 10

Miscellaneous:

	Page
56 A.L.R. 2d 1321	24
56 A.L.R. 2d 1379	24
58 Cong. Rec. 5472	19
58 Cong. Rec. 6434	20
H. Rep. No. 312, 66th Cong., 1st Sess	19
H. Rep. No. 866, 79th Cong., 1st Sess	21
S. Rep. No. 40, 79th Cong., 1st Sess	21

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 128

VERNON KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (R. 17) is reported at 272 F. 2d 944.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1959 (R. 17). The petition for a writ of certiorari was filed on January 22, 1960, and was granted on June 6, 1960 (R. 18). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consecutive sentences could properly be imposed upon two counts of an indictment charging

that petitioner and two other persons (1) transported a stolen motor vehicle in interstate commerce, and (2) received, stored, and concealed the same vehicle, when the indictment clearly indicates that these were separate acts.

STATUTES INVOLVED

The National Motor Vehicle Theft Act, 41 Stat. 324, 325, 18 U.S.C. (1940 ed.) 408, which was in effect at the time of the indictment, provided:

* * * * *

> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.
>
> SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

* * * * *

Sections 3 and 4 are now embodied in 18 U.S.C. 2312 and 2313, respectively, which provide in substantially the same language as follows:

18 U.S.C. 2312:

> *Transportation of stolen vehicles*
>
> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not

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more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2313:

Sale or receipt of stolen vehicles

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment returned in the United States District Court for the Eastern District of Kentucky on April 28, 1941, charged petitioner, Edwin Wade Sharpe, and William Edward Sanders, with violations of the National Motor Vehicle Theft Act (R. 2–4). Count 2 charged that the defendants on and about February 12, 1941, transported in interstate commerce from Atlanta, Georgia, to Owen County, Kentucky, a Ford automobile which had been stolen in Lake City, Florida, the defendants knowing that the Ford had been stolen (in violation of Section 3 of the Act, now 18 U.S.C. 2312, *supra,* pp. 2–3) (R. 3). Count 3 charged that, on and about January 19, 1941, and from that date to February 13, 1941, the defendants received, concealed, and stored in the Eastern District of Kentucky the same Ford which had been stolen in Florida on January 19 and was moving in interstate commerce (in violation of Section 4 of the Act, now 18 U.S.C. 2313, *supra,* pp. 2–3) (R. 3–4). Count 1 charged a conspiracy

to transport in interstate commerce vehicles which were known to have been stolen and to receive, conceal, and store such vehicles, and alleged the facts stated in counts 2 and 3 as overt acts (R. 2–3). Petitioner, who was represented by counsel, pleaded guilty to all three counts. He was given consecutive sentences of imprisonment for two years on count 1, five years on count 2, and five years on count 3—a total of twelve years (R. 5).

The present proceedings arose on April 9, 1959,[1] when petitioner filed a motion pursuant to 28 U.S.C. 2255 to vacate the sentence on count 3 for receiving, concealing, and storing the stolen automobile, on the ground that it charged the same offense as that for which he had been sentenced on count 2, the transportation count (R. 7–8). After considering the briefs filed by the parties (R. 9–12), the district court denied the motion to vacate sentence (R. 13). On appeal, the court of appeals unanimously affirmed the order denying the motion (R. 17).

---

[1] Petitioner was in prison in 1959 and is still today because of the following circumstances: At the same time that he was sentenced to twelve years' imprisonment in 1941 for violation of the National Motor Vehicle Theft Act, he was also given an additional five-year sentence for attempted escape. He was conditionally released in October 1951. In 1955 he pleaded guilty to a new charge of transporting stolen cars and was sentenced to imprisonment for five years. He finished serving this sentence in 1958. He then began to serve the remainder of the seventeen-year sentence imposed in 1941 since his new offense (in 1955) violated the terms of his conditional release in 1951.

SUMMARY OF ARGUMENT

I

Since petitioner pleaded guilty, the issue whether he could properly be given consecutive sentences for transportation and for receipt, concealment, and storage of a stolen automobile in interstate commerce must be determined from the face of the indictment. Petitioner does not deny that the indictment indicates that the acts of concealment were in addition to the transportation. But he does assume that the indictment shows one general transaction or course of conduct with reference to the stolen automobile. Count 3, however, charges concealment of the automobile in the Eastern District of Kentucky from January 19, 1941, the same day when the automobile was stolen in Florida, to February 13, 1941. Count 2 charges that the automobile was transported from Georgia to Kentucky on February 12. The indictment therefore makes clear that the transportation alleged in count 2 is not the original transportation from Florida to Kentucky since the automobile was already in Kentucky immediately following the theft on January 19. In these circumstances, it does not seem, and there is no reason to assume, that the transportation charged in the indictment was related to the concealment of the automobile which was undertaken immediately after the theft almost a month before the transportation charged in count 2.

Moreover, the indictment must be construed in the manner which is most favorable to the government. This is based on the principle that a person attacking

577048—60——2

a judgment has the burden to establish the facts supporting his claim. Here, the only relevant fact is the indictment itself, and, insofar as it is ambiguous, petitioner has failed to sustain his burden of proof. Further, it is established that when an indictment purports to charge a federal offense, it cannot be collaterally attacked unless it appears from the indictment's face that no offense could possibly have been committed.

In short, the indictment itself strongly suggests that the concealment and transportation were separate and unrelated acts—*i.e.*, that the concealment related to the original theft in January and that the transportation in February was separate from the prior theft and concealment. At the least, when the indictment is construed in the manner most favorable to the government, it charges two separate and unrelated acts.

Petitioner's position is therefore that "whether or not separate and distinct acts may be involved, the National Motor Vehicle Theft Act should be construed as not authorizing the imposition of separate punishments upon a single individual with reference to a general course of conduct involving a single automobile." Such a broad concept of merger of separate acts is contrary to the language of the Act, which make the acts of transportation and concealment separately punishable. Where, as here, the transportation is separate from the concealment and the theft, and the offenses are disparate in time, impulse, and purpose, the separate crimes are separately punishable. The more difficult factual situation

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where the transportation and concealment are part of a common transaction is not now before this Court.

II

A. Sections 3 and 4 of the Act, now 18 U.S.C. 2312 and 2313, provide for two separate offenses. Section 2312 punishes anyone who transports a stolen vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" such a vehicle. Of the acts specified by Section 2313, only "receives" would necessarily be involved in the transportation itself. The other acts could occur before, during, or after a particular interstate transportation, or not at all. Moreover, the term "whoever," which introduces Section 2313, is of the broadest possible coverage and shows that Congress intended to punish anyone who separately does the acts which Section 2313 prohibits, whether he is the transporter or someone else. The intent of Congress, as shown by the language of the statute to punish separately the activities specified in Sections 2312 and 2313, is particularly applicable to this case where, as we have shown, the transportation and concealment were separate acts.

B. The legislative history of the Act does not conclusively answer the issue before the Court. It does, however, show that Congress considered the offenses covered by the Act as extremely serious and intended to punish in Sections 3 and 4 two distinct offenses involving stolen vehicles. Thus, the legislative history lends some support that Congress intended to punish

separate violations of both sections of the Act even when the same person had committed both offenses.

C. This Court in *Woody* v. *United States,* 359 U.S. 118, affirmed, by an equally divided Court, a holding of the Court of Appeals for the Sixth Circuit (258 F. 2d 535) that a person may be separately punished for transporting and for receiving and concealing the same automobile in violation of Sections 3 and 4 of the Act. In *Woody,* as here, the acts of transportation and concealment were separate from the transportation. Other lower federal court decisions have uniformly held that violations of both Sections 3 and 4 of the Act are separately punishable even when only one act or transaction is involved.

The so-called doctrine of lenity does not apply to situations such as that involved here, where different acts at different times are involved. Under *Bell* v. *United States,* 349 U.S. 81, 83–84, the rule of lenity is limited to the situation where the offenses involve a single transaction; it is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. The decision in *Heflin* v. *United States,* 358 U.S. 415 (that a bank robber could not be separately punished for receiving the money he had helped to steal), not only turns on the particular history of the bank robbery statute—"a unique statute of limited purpose" (*Prince* v. *United States,* 352 U.S. 322, 325)—but involves a situation where there was a common-law conceptual difficulty in separating the receiving from the stealing. There is no such conceptual difficulty here where

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the concealment and the transportation could be, and the indictment indicates that they were, separate in time and presumably in purpose. Moreover, the Court indicated in *Heflin* that it was considering "multiple aspects of the same criminal act." On the other hand, in order to sustain petitioner's position, it would be necessary to hold that acts of concealment, which are distinct from and in addition to the transportation, are not subject to separate punishment. Such an interpretation would be contrary to the words of the statute, its legislative history, the decisions of the lower federal courts, and of this Court.

ARGUMENT

Since petitioner pleaded guilty, the issue whether he could properly be given consecutive sentences for transportation and also for receipt, concealment, and storage of a stolen automobile in interstate commerce must be determined from the face of indictment. The indictment here shows that the acts charged in count 3 were completely separate from the transportation alleged in count 2, even though the same automobile was involved. Therefore, as we will show, the acts charged in the two counts constitute separate offenses which are separately punishable just as two separate acts of transportation of the same stolen automobile would be. Whether the transportation and concealment would be separately punishable if they were part of a single transaction—an entirely different factual situation—is a more difficult issue which is not now before this Court.

I

THIS CASE DOES NOT INVOLVE A SINGLE ACT OR TRANSACTION

On several preliminary matters, there is no dispute between petitioner and the government. The government does not dispute the right of petitioner to raise by collateral attack under 28 U.S.C. 2255 the question as to whether, on the face of the indictment, consecutive sentences could properly be imposed on count 2 charging transportation and count 3 charging receipt, concealment, and storage of a stolen automobile in interstate commerce. On the other hand, petitioner does not deny that, on this record, in view of his plea of guilty, consideration of the issue must be determined from the face of the indictment. Nor does he deny that the face of the indictment demonstrates that the acts of receiving, concealing, and storing were in addition to and beyond the transportation charged in count 2.

Petitioner does assume that the indictment shows one general transaction or course of conduct with reference to the stolen automobile. Beyond the fact that the same automobile was involved, we do not believe that even this assumption can be made. The concealment count charges concealment of the automobile in the Eastern District of Kentucky from on or about January 19, 1941, the same day when the automobile was stolen in Florida, to February 13, 1941 (count 3) (R. 4). The transportation count charges that the automobile was transported from Atlanta, Georgia, to Owen County, Kentucky, on or about

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February 12, 1941 (count 2) (R. 3). The indictment therefore makes clear that the transportation alleged in count 2 is not the original transportation from Florida to Kentucky since the automobile was already in Kentucky immediately following the theft on or about January 19. Rather, the indictment indicates that the automobile was first transported from Florida to Kentucky, was subsequently transported from Kentucky to Georgia some time between January 19 and February 12, and then almost a month after the original transportation to Kentucky was transported from Georgia back to Kentucky. In these circumstances, there is no reason to assume that the transportation (on or about February 12) from Georgia back to Kentucky was related to the concealment of the automobile in Kentucky immediately after the theft on January 19—particularly since the great majority of the period of concealment, January 19 to February 13, occurred prior to the charged transportation from Georgia to Kentucky on and about February 12.

Moreover, we submit that the indictment must be construed in the manner which is most favorable to the government. This Court has held that, when a defendant attacks a judgment, the burden is on him to show the facts supporting his claim. *In re Cuddy,* 131 U.S. 280, 286; *Ex parte Hull,* 312 U.S. 546, 551. By pleading guilty, petitioner removed the necessity for the government to prove the facts underlying the indictment, and made the indictment the sole relevant fact supporting his collateral attack which was initiated eighteen years later. Insofar as

the indictment, *i.e.*, the only relevant fact, is ambiguous, petitioner has failed to sustain his burden of proof. Further, it is established that, when an indictment purports to charge a federal offense, it cannot be challenged after conviction, unless it appears from the indictment's face that no offense could possibly have been committed. *Goto* v. *Lane,* 265 U.S. 393; see also *Knewel* v. *Egan,* 268 U.S. 442. By a parity of reasoning, it cannot be assumed on collateral attack that two counts of an indictment which do not on their face necessarily relate to one act or transaction nevertheless do so.

In short, the indictment itself strongly suggests that the concealment and transportation were separate and unrelated acts—that the concealment related to the original theft and that the transportation had nothing to do with the theft or the concealment, but was for a subsequent separate purpose. At the least, when the indictment is construed in the manner most favorable to the government, it charges two separate and unrelated acts. The only connection between the transportation and concealment is that they occurred within the continuous period when petitioner and his codefendants had the stolen automobile under their control.

Petitioner's position therefore has to be, and in fact is, the very broad one that "whether or not separate and distinct acts may be involved, the National Motor Vehicle Theft Act should be construed as not authorizing the imposition of separate punishments upon a single individual with reference to a general course of conduct involving a single automo-

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bile" (Pet. Br. 5–6). We think this concept of the merger of separate acts is contrary to the intent of Congress and to the normal interpretation of federal criminal statutes. The issue thus posed does not call for application of the so-called "rule of lenity" which relates to the question of whether multiple offenses shall be deemed to have arisen out of a single transaction (see *infra*, pp. 26–29). The acts of transportation and concealment were made separately punishable by Congress, and if there is any ambiguity about the intent of Congress at all, it relates only to the situation where the acts of concealment are wholly encompassed in the transportation charged.

Where, as here, the transportation is something separate and apart from the concealment, we think it is clear that the separately proscribed act of transportation may be punished separately from the separately proscribed act of concealment. If someone stole the automobile in Florida and brought it to Kentucky, held it in Kentucky for a month, and then drove it from Kentucky to California, the transportation from Florida to Kentucky, and the transportation from Kentucky to California, would plainly be separate offenses separately punishable. Otherwise, an accused fortunate enough to avoid apprehension for several years could commit an unlimited number of offenses of transporting and concealing in many different states, and still be punished only to the same extent as a one-transaction violator. We think that the situation is the same here where the

577048 60 - 3

indictment must be construed to charge a transportation which is something separate from the concealment or the theft. Since the offenses are disparate in time, in impulse, and in purpose, the separate crimes are separately punishable.

II

SEPARATE ACTS OF TRANSPORTATION AND OF CONCEALMENT ARE SUBJECT TO SEPARATE PUNISHMENT

A. THE LANGUAGE OF THE STATUTE

The two sections here involved (Sections 3 and 4 of the National Motor Vehicle Theft Act, 41 Stat. 324, 325, now 18 U.S.C. 2312 and 2313, *supra*, pp. 2–3) clearly make provision for two separate offenses. Section 2312 punishes anyone who transports in interstate commerce a stolen motor vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" a stolen vehicle moving as part of interstate commerce, knowing it to have been stolen.

On their face, the two sections punish separate activities. Thus, the activities punishable under Section 2313 obviously can take place without any transportation. For example, concealment can involve such affirmative acts of wrongdoing as changing motor numbers, executing false bills of sale, repainting, and major repairs. These acts, which are entirely distinct from transportation, have been held to be in themselves offenses under Section 2313. *Donaldson* v. *United States*, 82 F. 2d 680 (C.A. 7); *United States* v. *Di Carlo*, 64 F. 2d 15 (C.A. 2); *United States* v. *Guido*, 200 F. 2d 105 (C.A. 2);

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Phillips v. *United States,* 206 F. 2d 923 (C.A. 10). Of the various acts specified by Section 2313, only "receives" would *necessarily* be involved in the transportation itself. "Conceal," "barter," and "store" could occur before, during, or after a particular interstate transportation, or not at all. "Sell" and "dispose of" would usually occur, if at all, after some interstate transportation in order to be federally punishable. Conversely, the transportation punishable under Section 2312 can obviously occur without any of the activities mentioned in Section 2313. It is thus evident from the face of the statute that Congress intended in Section 2313 to punish acts which were separate from, and in addition to, the interstate transportation, and which would normally require a criminal impulse separate and different from the act of transporting.

There is further evidence from the statute that Congress did not intend the acts punishable under Sections 2312 and 2313 to be alternate ways of committing the same crime. The word "whoever," which introduces Section 2313 (*supra,* p. 3), is of the broadest possible coverage. It includes the person who does the transporting if, in addition to transporting, he commits any of the several acts which Section 2313 punishes. Indeed, if Congress had intended Section 2313 to apply only to someone other than the transporter—*i.e.,* a confederate or "fence"—it would have been easy enough to provide for punishment of one who conceals, barters, sells, etc., a stolen motor vehicle "received from" a person who trans-

ported it in interstate commerce. The language which Congress used shows that it intended to punish anyone who separately does the affirmative acts which Section 2313 prohibits, whether he is the transporter or someone else.

The intent of Congress, as shown by the language of the statute, to punish separately the activities specified in Sections 2312 and 2313 is particularly applicable to this case. The violator of Section 2312, the transporter, need not be the thief, and the indictment here suggests that petitioner in fact was not. The indictment indicates, and must be construed to allege, that the transportation of the stolen automobile from Georgia to Kentucky on or about February 12 was not related to the theft, which occurred almost a month before, or to the concealment after the theft, which began immediately after the theft when the automobile was first brought to Kentucky from Florida (see *supra*, pp. 10–12). Certainly, it would be incongruous to hold that a person who transports a stolen automobile cannot be separately punished for acts which are prior to and apparently not related to that act of tranporting—acts designed in some other way to keep the automobile from its original owner.

Petitioner's reliance (Pet. Br. 8) on the common-law doctrine that a thief cannot be a receiver is misplaced.[2] The rationale of the rule was that a thief

[2] This rule has not hitherto found general acceptance in the federal courts, even where the theft itself is a federal crime. Under the doctrine that Congress may punish separately each

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could not receive from himself. But, even at common law, if one was convicted of larceny as an aider and abettor, and did not himself take part in the actual taking of the goods, he could be convicted as a receiver. *Inman* v. *United States,* 243 F. 2d 256 (C.A. D.C.), certiorari denied, 358 U.S. 888; *Aaronson* v. *United States,* 175 F. 2d 41 (C.A. 4). Thus, the basis of the common-law rule is that receipt of the goods by the actual thief is an integral and necessary component of the crime of larceny itself. Accordingly, the logic of the common-law rule does not apply at all in this case. Transportation and concealment are not necessary to the other; each can and often does occur alone. Moreover, even when the same person does both acts, the act of transportation does not necessar-

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step of a single transaction (*Albrecht* v. *United States*, 273 U.S. 1, 11; *Burton* v. *United States*, 202 U.S. 344, 377), the lower courts have held that possession of stolen property, even by the thief himself, at a time and place different from the time and place of theft, constitutes a crime distinct from the theft. *Carroll* v. *Sanford*, 167 F. 2d 878 (C.A. 5); *Carroll* v. *United States*, 174 F. 2d 412 (C.A. 6), certiorari denied, 338 U.S. 874; *United States* v. *Dunbar*, 149 F. 2d 151 (C.A. 7), certiorari denied, 325 U.S. 889; *Thomas* v. *United States*, 249 F. 2d 429 (C.A. 9), certiorari denied, 355 U.S. 936; *Carpenter* v. *Hudspeth*, 112 F. 2d 126 (C.A. 10). Recently, this Court held in *Heflin* v. *United States*, 358 U.S. 415, that a bank robber may not also be convicted and given a consecutive sentence for receiving stolen property, but this decision was based specifically on the particular history of the bank robbery statute (see *infra*, p. 28). It is not necessary for present purposes to determine whether *Heflin* weakens the force of the earlier federal decisions, since, as discussed in the text, the common-law rule is clearly not applicable to this case. See *Milanovich* v. *United States*, 275 F. 2d 716 (C.A. 4), pending on writ of certiorari, No. 79, this Term.

ily bear a relationship to the concealment. It is possible and not uncommon for a person, whether the thief or someone else, to repaint a motor car, change its numbers, etc., or perform any other affirmative separate act of concealment, and then one month or six months later transport the automobile over state lines. It cannot be said that in such a situation the transportation bears the same relationship to the concealment by the transporter as would the receipt of an automobile by the thief. And, at most, the common-law doctrine to which petitioner adverts would permit an analogy where the acts of concealment in fact occurred during transportation immediately after the theft and as part thereof. Since the indictment shows that such was not the situation here—that the charged concealment began long before the charged transportation—petitioner cannot rely upon that doctrine.

B. THE LEGISLATIVE HISTORY

The legislative history of the National Motor Vehicle Act does not conclusively answer the question before the Court—whether a person who violates both Sections 3 and 4 of the Act can be punished separately for these offenses, particularly where the violations are separate and not part of a single transaction. Nevertheless, this legislative history does show that Congress considered the offenses covered by the Act as extremely serious and intended to punish in Sections 3 and 4 two distinct activities involving stolen vehicles. Thus, the legislative history suggests that Congress intended to punish separate violations of both sections of the Act even when the same person commits both offenses.

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The report of the House Committee on the Judiciary, H. Rep. No. 312, accompanying H.R. 9203, 66th Cong., 1st Sess., p. 1, stated that the purpose of the bill was for:

> * * * the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. There has been and is now a most widespread demand for such a law. State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines. The losses to the people of the United States by reason of this stealing amounts to hundreds of thousands of dollars every year. It is getting worse. It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 percent. It is automobiles of that price that are generally stolen. Automobile thieves who make a specialty of this crime do not steal many of the higher priced cars, the reason being of course that they are not so easily sold. * * *

In the House debate, Congressman Dyer, the sponsor, announced that the purpose of the legislation was to suppress crime in interstate commerce, and continued (58 Cong. Rec. 5472):

> * * * Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automo-

> biles is made a crime under the laws of all the States in the Union. No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it with the penalties attached.
>
> * * * * *
>
> [The bill] provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it.

In the debate in the Senate, Senator Cummins spoke of the two separate sections of the Act here involved in the following words (58 Cong. Rec. 6434):

> * * * The practice is to steal an automobile close to a State line and run it across the State line. The first section [Section 3] is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, *to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen.* * * * [Emphasis added.]

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When he spoke of the further practice to dispose of the vehicle to some other person, confederate or otherwise, Senator Cummins seems to have had the practice of the transporter-thief in mind. His statement indicates that, in committing such additional acts, the transporter would be guilty of an offense under Section 4 as well as Section 3.

Consistent with the government's contention, the 79th Congress, which amended the original Act to include stolen aircraft (59 Stat. 536), interpreted Sections 3 and 4 as proscribing separate and distinct crimes without reference to whether one or more persons were involved in the transaction. Both S. Rep. No. 40, 79th Cong., 1st Sess., p. 1, and H. Rep. No. 866, 79th Cong., 1st Sess., p. 1, stated:

> The National Motor Vehicle Theft Act, enacted October 29, 1919, makes it a crime to transport or cause to be transported in interstate commerce a motor vehicle knowing the same to have been stolen. It is also a crime to receive, conceal, store, barter, sell or dispose of such a motor vehicle knowing that it has been stolen. Maximum penalties under the act are fixed at $5,000 fine, or 5 years' imprisonment, or both.

In sum, nothing in the legislative history suggests that all acts performed with respect to one stolen vehicle—no matter how many times transported, or how many different places concealed, or how separate the transportation and concealment—are subject to only one punishment. Rather, it indicates that where, as here, the transportation and concealment are disparate, the separate acts may be separately punished.

C. THE JUDICIAL DECISIONS

The question involved in the instant case as to whether a person may be separately punished under Sections 3 and 4 of the National Motor Vehicle Theft Act for transporting and concealing the same automobile was before this Court in *Woody* v. *United States,* 359 U.S. 118. There the decision of the Court of Appeals for the Sixth Circuit (258 F. 2d 535), that one person can commit separate offenses under the separate provisions of the statute with respect to the same automobile, was affirmed by an equally divided Court. Since no record was before the court of appeals—no transcript was made of the evidence until after the grant of certiorari (see the government's brief in *Woody,* No. 135, Oct. Term, 1958, p. 5, note 2)—the court of appeals' decision was based on an indictment similar to that involved in the instant case except that there was no comparable indication that the transportation was unrelated to the theft or the concealment (see the Record in *Woody,* p. 20). Rather, the first count simply alleged transportation and the second alleged receipt and concealment, all on or about March 16, 1954, thereby suggesting that they were parts of a common transaction. Thus, as the case appeared before the court of appeals, it was considerably more favorable for Woody than the situation of petitioner before this Court.

As the *Woody* case was presented to this Court, the transcript showed concealment occurring both before and after the transportation alleged (see the

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government's brief in *Woody,* pp. 5–6). This evidence established, like the indictment in the present case, that the concealment and transportation were separate acts (see the government's brief in *Woody,* pp. 23–25). In addition, the evidence in *Woody* included affirmative acts of concealment such as changing motor members, executing a false bill of sale, painting, and other major repairs. While such evidence was of course not offered in the present case because petitioner pleaded guilty, it is just as consistent with the indictment here as that in *Woody* and might well have been offered if the case had been tried. Construing the indictment, as we must (see *supra,* pp. 11–12), in the manner most favorable to the government, it can be assumed that petitioner also engaged in affirmative, specific acts of concealment. In that sense, the present case is substantially the same as *Woody* as the latter case was considered both by the court of appeals and by this Court.

The lower federal court decisions have consistently taken the position that, since the two sections of the Act provide separate offenses for transporting a stolen automobile and for receiving and concealing it, cumulative sentences may be imposed. *York* v. *United States,* 299 Fed. 778 (C.A. 6); *Chrysler* v. *Zerbst,* 81 F. 2d 975 (C.A. 10); *Doll* v. *Johnston,* 95 F. 2d 838 (C.A. 9), certiorari denied, 304 U.S. 574; *Jackson* v. *Hudspeth,* 111 F. 2d 128 (C.A. 10); *Record* v. *Hudspeth,* 126 F. 2d 215 (C.A. 10), certiorari denied, 316 U.S. 703; *Lindsay* v. *United States,* 134 F. 2d 960 (C.A. 10), certiorari denied, 319 U.S. 763; *Batson* v. *Squier,* 146 F. 2d 264 (C.A.

9), certiorari denied, 324 U.S. 874; *Pifer* v. *United States,* 158 F. 2d 867, 868 (C.A. 4), certiorari denied, 329 U.S. 815; *Madsen* v. *United States,* 165 F. 2d 507, 510 (C.A. 10); *Crawford* v. *United States,* 214 F. 2d 313 (C.A. 6); *Austin* v. *United States,* 224 F. 2d 273 (C.A. 6); *United States* v. *Hampden,* 294 Fed. 345 (E.D. Mich.); *United States* v. *Runion,* 47 F. Supp. 594 (E.D. Ky.); *United States* v. *Spradley,* 65 F. Supp. 136 (W.D. Ky.), affirmed, 162 F. 2d 203 (C.A. 6);[3] see also 56 A.L.R. 2d at 1321 (§ 8) and at 1379 (§ 47). These cases (except *York*) arose on collateral attack and the courts found it unnecessary for the most part to determine whether in fact the offenses were part of one act of transportation as the defendant normally alleged. They held that, even on that assumption, the offenses were distinct since each section of the statute required proof of acts which the other did not. For example, in *Chrysler* v. *Zerbst, supra,* the court said (81 F. 2d at 976):

> * * * [e]ach count of the indictment charged a separate and distinct offense. The offense charged in count one involved the element of transportation in interstate or foreign commerce, and receiving and concealing the motor vehicle was not an element thereof. The offense charged in count two involved the elements of receiving and concealing the motor vehicle and transportation thereof in interstate commerce by the defendants, was not an element of that offense.

[3] In the *Chrysler*, *Doll*, *Jackson*, *Lindsay*, *Runion*, and *Spradley* cases, the defendant entered a plea of guilty, just as did petitioner in the instant case.

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And in *Lindsay* v. *United States, supra,* the separability of the two statutory offenses was recognized in this language (134 F. 2d at 960–961):

> Congress may prohibit and make punishable as a separate and distinct offense each separate and distinct act or step of a single transaction which embraces an element which the others do not.
>
> * * * * *
>
> While the offenses charged in count two may have been directly related to the transportation of the automobile from Portales to Tulsa and a continuation of that transaction, each required proof of a fact not required to establish the charge in count one, namely, receiving, concealing, and storing the automobile. It follows that the offenses charged in count two were separate and distinct from the offense charged in count one.

It is unnecessary, however, to adopt so broad a rule to sustain the sentences in this case, since here the concealment was separate and apart from the transportation. A similar situation was involved in *United States* v. *Hampden, supra,* although there the concealment and storage occurred after the transportation, instead of before the transportation as in the case now before the Court. In denying a petition for modification of sentences, the court said (294 Fed. at 348):

> * * * It certainly cannot be said in the present case that the concealing or storing of the stolen automobile in Detroit was necessarily an incident of its transportation to Detroit. Such

> transportation ended on arrival at its destination. The concealment and storage occurred after such arrival. Petitioner, in fact, concedes that in the systematic stealing of automobiles, which the Dyer Act was designed to reach, one party usually does the stealing, and another party at the end of the line receives and stores and sells the stolen transported automobile, and that it was the purpose of this statute to make each of these acts a crime, and thereby to punish each offender concerned therein. *The fact, however, that each of these acts, which Congress has thus defined as a separate legal offense, has been committed by the same person, instead of by several persons, cannot render them any the less separate offenses,* and, the jury having found that petitioner committed each of the forbidden acts, he was properly convicted and sentenced for each of the crimes created by Congress and charged in the indictment. [Emphasis added.]

None of the recent decisions of this Court on which petitioner relies (Pet. Br. 7, 14–18) is applicable to the present case. While these decisions might be relevant if the transportation and concealment were related parts of a single transaction—such as concealment during the period of transportation—this is not, as we have pointed out, the situation here (see *supra,* pp. 10–14). The cases are not relevant when the two acts punishable are entirely separate. In *Bell* v. *United States,* 349 U.S. 81, 83–84, in explaining the rule of lenity, the Court said that, "if Congress does not fix the punishment for a federal offense clearly

and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses". The rule of lenity thus applies to the situation where the offenses involve a single transaction; it is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. In holding that the transportation of two women across state lines at the same time constitutes only a single offense under the Mann Act, the Court did not cast the slightest doubt on the proposition that the transportation of the same woman at two different times would be two offenses under that statute. Similarly, *Ladner* v. *United States,* 358 U.S. 169, decided that a person who assaults two federal officers while under arrest by the single discharge of a shotgun commits only a single offense under former 18 U.S.C. 254 (now 18 U.S.C. 111).[4] Obviously, the single discharge of a shotgun constitutes a single act or transaction in the narrowest physical sense. In *Gore* v. *United States,* 357 U.S. 386, the majority held that Congress intended to authorize separate punishment under different narcotics statutes, although the offenses derived from a single transaction.[5] And even the dissenting opinions, while claiming that a single

[4] The case was remanded to the district court for a hearing as to whether the two officers were in fact wounded by one shot or more.

[5] Petitioner attempts (Pet. Br. 18) to distinguish *Gore* on the ground that there "Congress was making criminal separate acts in a context where one person might commit all, or less than all, of those acts." But of course this is just as true with regard to Sections 3 and 4 of the National Motor Vehicle Theft Act.

sale constituted only one offense, did not imply that the two separate sales, which were proved, constituted only one offense.

Prince v. *United States,* 352 U.S. 322, involved a "narrow" question concerning "a unique statute of limited purpose," the Federal Bank Robbery Act (*id.* at 325; see also *Gore* v. *United States, supra,* 357 U.S. at 391–392). The Court held that Congress did not intend to punish the same person for both entry into a bank with intent to rob and the completed robbery after entry. But, again, this holding forbids multiple punishment in a factual situation where both offenses are part of a single continuous act or transaction.* And the decision in *Heflin* v. *United States,* 358 U.S. 415 (that a bank robber could not be separately punished for receiving the money he had helped to steal), not only turns, like the *Prince* case, on the particular history of the bank robbery statute, but involves the common-law conceptual difficulty in separating receiving from stealing (see *supra,* pp. 16–18). As discussed above, there is no such conceptual difficulty

* Moreover, the entry and completed robbery are part of the same act or transaction in all cases where both are charged, not merely in the particular factual situation involved in *Prince.* For, while entry can be accomplished without a completed robbery, the converse is not true; a completed robbery of a bank must necessarily be preceded by an entry. Thus, in the absence of contrary statutory language or legislative history, it is logical to assume that Congress did not intend to punish every successful robber for both the completed robbery and the necessarily preliminary entry. Here, however, as we have shown (*supra,* pp. 14–15), transportation and concealment can occur without the other, and they occur together only when the same person chooses to use both methods to keep the automobile from its owner.

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here where the transportation need not be, and was not, related either to the theft or the concealment. Moreover, the Court indicated in *Heflin* that, as in *Prince,* the question at issue was "the intent of Congress in punishing multiple aspects of the same criminal act" (358 U.S. at 419).[7] Here, the concealment and the transportation could be, and the indictment indicates that they were, separate in time and presumably in purpose.

In short, this Court has never held or even suggested that separate acts are not separately punishable even under the same statutory provisions. Instead, the cases cited by petitioner concern whether a single act or transaction may constitute more than a single punishable offense, and the holdings of the Court on this issue have turned on the language and legislative history of the particular statute. But here we do not have the analogous issue whether Congress intended acts of concealment to be separately punishable when

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[7] Petitioner claims (Pet. Br. 17) that in *Heflin*, like the present case, the Court was limited to consideration of the face of the indictment and that thereafter "it would have been possible to conjure up the possibility that the robbers had committed separate acts with respect to the loot. In fact, the Court mentions the possibility that the robbers may have gotten together after the robbery and divided up the loot—clearly a separate act committed at a separate time and place and not inherent in the act of robbing." But while dividing up the loot is a separate physical act from robbery, it is obviously closely related to robbery and may well be considered as part of a single transaction. In the present case, the indictment indicates that the concealment was unrelated to the transportation which occurred long after the concealment began (see *supra*, pp. 10–11), and the indictment should, under the decisions of this Court (see *supra*, pp. 11–12), be so construed.

they occur at the time, and as a part, of the transportation. On the contrary, here the concealment and transportation were separate acts, each of which Congress has made punishable. To sustain petitioner's position, it would be necessary to hold that acts of concealment which are clearly distinct from and in addition to the transportation are not subject to separate punishment. Such an interpretation would be contrary to the words of the statute, its legislative history, and the decisions of the lower federal courts and of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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